



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **068622/2024**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES
- DATE: 18 July 2025
- SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

ANNETTE CAPPER

Applicant

and

AJAY WASSERMAN

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

- [1] This application concerns trust that was tragically misplaced. The applicant, a 72-year-old female, claims payment of an amount of R 1 million from the respondent, a 31-year-old male, who for all intents and purposes, she deemed to be like a son to her. The respondent does not deny that the applicant advanced the amount of R 1 million to him in terms of a written loan agreement and that the amount is due and owing. The respondent's refusal to pay the amount is based on the provisions of the National Credit Act, 34 of 2005. According to the respondent, the loan falls foul of the provisions of the Act, is thus *void ab initio* and absolves him from his liability to repay the loan.

Background

- [2] The applicant's deceased husband, Peter, was a close friend of the respondent's grandfather, Paul Jacobs. Paul passed away on 29 December 2015 and the applicant and her husband ("the couple") met the respondent at Paul's funeral.
- [3] After the funeral the respondent, being 23 years old at the time started visiting the couple's house on a regular basis. The respondent was keen to become involved in business and during his various visits he relied on Peter for advice and guidance. Due to Peter's constant support and advice in respect of the respondent's plans, the respondent looked up to Peter as a father figure and mentor. The visits were also social and nurturing in nature and the relationship between the couple and the respondent became so close that they considered him as another son.
- [4] During 2017 the respondent told the couple that he planned to start a business but had no money as start-up capital. He asked whether Peter could lend him R 100 000, 00. The couple discussed the request and decided to each loan a R 100 000, 00 to the respondent. The applicant explained that they advanced the R 200 000, 00 to the respondent out of affection, not really expecting the respondent to pay it back.

- [5] The respondent gladly accepted the couple's offer and insisted to pay interest at the rate of 10% per annum. Although the couple did not want to accept the interest payment, the respondent insisted, and the applicant stated that she thought that it was a point of honour for him. The regular visits continued and the respondent would monthly hand an amount of cash to the couple that was equal to the approximate of monthly interest.
- [6] The loans were eventually repaid and the couple noted that the respondent grew more and more financially successful. They were, naturally, very proud of and happy for him. As time passed, the couple grew confident enough in the respondent to appoint him as an executor in both their estates and as a trustee in their family trust.
- [7] During January 2020 the couple departed to their holiday home in Portugal and planned to return on 1 April 2020. The COVID pandemic, however, struck and they were stranded in Portugal. On 6 July 2020 Peter had a stroke, followed by a long period of hospitalisation and recovery. The applicant stated that the period was extremely stressful and distressing for her, more so being in a foreign country with a completely foreign language. The respondent proved to be an invaluable source of moral and practical support to the applicant during this difficult period.
- [8] Whilst still in Portugal in extremely stressful circumstances, the respondent called the applicant and informed her that he had a cash flow problem. He requested a loan of R 2 million which he would repay after five years. The applicant stated that she was surprised at both the timing and the amount of the request. At that stage Peter was paralyzed and bedridden, and almost in a vegetative state. The applicant could not ask or get guidance from Peter which caused further stress and turmoil. Being at wits end, the applicant asked herself what Peter would have done in the circumstances. The applicant was convinced that Peter, out of concern for the respondent's wellbeing would have advanced the money to the respondent.

- [9] At that stage the respondent 's request was for R 1 million repayable over two years. The respondent once again insisted on paying interest at the rate of 10% per annum. The applicant agreed to the terms and advanced the R 1 million to the respondent. The couple returned from Portugal in mid-November 2020 and the respondent's frequent visits continued. During one of the visits the respondent presented the applicant with a written loan agreement and told the applicant it would be in both their best interests to have a written loan agreement. The agreement was drafted by the respondent.
- [10] The applicant trusted the respondent wholeheartedly and did not concern herself with the details in the agreement. At the insistence of the respondent, the applicant signed the agreement without any hesitation. The applicant paid the loan amount to the respondent on 9 December 2020. In terms of the agreement an amount of R 8 334, 00 was payable monthly in respect of the interest.
- [11] Peter passed away on 22 July 2022. Some months after Peter had passed away, the applicant noticed that the respondent had fell into arrears on the monthly interest payments. Thereafter requests by the applicant for payment of the interests and thereafter the capital amount were met with promises, delaying tactics and overall emotional manipulation. Needless to say, the frequent visits became sporadic and at some stage seized all together. The respondent's conduct led to the applicant seeking legal advice and notwithstanding various letters of demand, the respondent did not honour his obligations. His failure resulted in the present application.

Point in limine: Incorrect procedure

- [12] The respondent submitted that a dispute of fact exists and because the applicant has a damages claim, she should have utilised summons proceedings as contemplated in rule 18 of the uniform rules of court.
- [13] The point is ill conceived and devoid of any merit. The facts are common cause between the parties, and a party is in any event at liberty to choose whichever

process he/she deems prudent for the prosecution of his/her claim. The risks consequent upon the choice is upon the party that is *dominus litis*.

[14] The point *in limine* is dismissed.

[15] The respondent's main defence, i.e. that the loan agreement is unlawful and void *ab initio* was pleaded as a second point *in limine*. The defence is directed at the merits of the applicant's claim and is not a point *in limine*.

[16] In the result, I proceed to consider the respondent's defence to the merits of the applicant's claim.

National Credit Act, 34 of 2005 ("the Act")

[17] As alluded to earlier, the respondent did not deny the factual averments made by the applicant but relied on the provisions of the Act to avoid honouring his obligations in terms of the loan agreement.

[18] The Respondent contended that the loan is a credit agreement as contemplated in section 8(4)(f) of the Act, in that payment is deferred and interest is payable in terms of the agreement.

[19] Being a credit agreement, the Act is applicable to the agreement in terms of section 4(1) which section reads as follows: "*Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing **at arm's length** and made within, or having an effect within, the Republic...*"¹ (own emphasis)

[20] Since the Act is applicable to the loan agreement the applicant had to be registered as a credit provider in terms of section 40(1) of the Act and due to the applicant's failure to register as a credit provider, the loan agreement is in terms of section 40(4) unlawful and void to the extent provided for in section 89.

¹ Section 4(1) of the National Credit Act, 34 of 2005.

- [21] Section 89(5) provides for the consequences of an unlawful credit agreement and reads as follows:

“89(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-

(a) the credit agreement is void as from the date the agreement was entered into;

(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.”²

- [22] The applicant contended that the loan agreement, in terms of section 4(2)(b), does not fall within the ambit of the Act. The section provides as follows:

“4(2)(b) in any of the following arrangements, the parties are not dealing at arm’s length:

(i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;

(ii) a loan to a shareholder or other credit agreement between a juristic

² Section 89(5) of the National Credit Act, 34 of 2005.

person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;

(iii) a credit agreement between natural persons who are in a familial relationship and-

(aa) are co-dependent on each other; or

(bb) one is dependent upon the other; and

(iii) any other arrangement-

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or

(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length;”³

[23] The applicant, more specifically, place reliance on the provisions of section 4(2)(b)(iii)(aa).

Discussion

[24] The undisputed facts paint a picture of a close, loving relationship between the applicant and the respondent. It is common cause between the parties that the relationship was akin to a mother and son relationship. I find the respondent's denial that a close relationship existed to be contrary to good morals.

[25] To add insult to injury, the respondent, on all accounts a successful businessman, drafted and presented the loan agreement to the applicant, an elderly lady without any business acumen. It was the respondent who insisted on the payment of interest, which insistence the applicant considered to be borne out of a sense of pride. The respondent's conduct has sadly proven the exact opposite. Furthermore, the respondent took umbrage with the fact that the applicant endeavoured through legal means to claim the amount that is due and owing to her. The averment is astonishing, to say the least.

³ Section 4(2)(b) of the National Credit Act, 34 of 2005.

[26] In the circumstances, I have no hesitation in finding that the applicant and respondent was not independent and that the applicant did not strive to obtain the utmost possible advantage out of the transaction.

[27] In the result, the loan agreement is lawful and the applicant is entitled to the relief claimed herein.

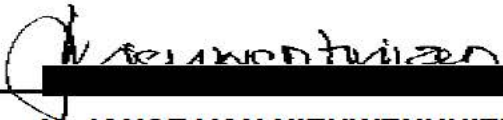
Costs

[28] The applicant did not seek a punitive cost order against the respondent. In the exercise of my discretion and to demonstrate the court's utmost dismay with the respondent's conduct, I am, however, of the view that a punitive cost order should follow. Justice would not prevail if the court turns a blind eye to conduct that is blatantly *contra bonos mores*.

ORDER

Judgment is granted in favour of the applicant against the respondent for;

1. payment of the amount of R 1 000 000, 00;
2. interest thereon calculated at the rate of 10% per annum from 1 November 2023 until date of final payment;
3. costs on an attorney and client scale.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD:

8 May 2025

DATE DELIVERED:

18 July 2025

APPEARANCES

Counsel for the Applicant: Adv BM Slon

Instructed by: Nicqui Galaktiou Incorporated

Counsel for the respondent: Adv IN Kruger

Instructed by: Brits Law Incorporated